

## **Age Discrimination Protections**

State and federal law protects most workers age 40 and older from workplace discrimination. Wisconsin's Fair Employment Law sections 111.31-111.395, Wisconsin Statutes apply to virtually all private and public employers, regardless of the number of employee's.

Federal age protections are contained in the Age Discrimination in Employment Act, known as the ADEA. The ADEA applies only to employers with 20 or more workers.

As with other protected classes such as race, national origin, sex, and disability, Wisconsin's legislature declared that discrimination against qualified older workers unfairly denies their right to gainful employment.

While state law promotes employment of older persons based on their ability rather than their age, employers may terminate a worker, irrespective of age, if he or she is physically or otherwise **unable to perform** essential job duties. However, an employer may be required to make a **reasonable accommodation** for a worker who is unable to perform essential job functions because of a disability.

## **What actions are covered?**

State law protects older workers against discrimination in discharge, job assignments, leave or benefits, licensing, retirement benefits, hiring, pay, promotion, training and other employment actions.

The law also prohibits an employer from **retaliating** against applicants or employees who assert their rights under the law. Employers are also responsible for ensuring that older workers are not **harassed** on the job because of their age. Unlawful harassment may include persistent remarks about a person's age or other behavior, which interferes with a person work performance or otherwise creates an intimidating, hostile or offensive work environment.

## **Is everyone protected based on his or her age?**

No, the law doesn't protect persons less than 40 years of age. Though questionable and perhaps unfair to younger workers, an employer can legally give a hiring "preference" to older workers. State law also contains the following **exceptions**, which permit an employer to consider age in its decisions:

### **...for Hazardous employment:**

An employer may "exercise an age distinction" (for example, it may set a maximum age of 60) if the job involves physical danger or is hazardous, such as law enforcement or firefighting.

### **...for future advancement to a higher level job:**

An employer may hire a younger person if the knowledge and experience to be gained in the job is required for future advancement to a managerial or executive position.

### **...for school bus drivers:**

Under another state law related to licensing school bus drivers, [section 343.12(2), Wisconsin Statutes], a person must be between 18 and 70 years of age to meet licensing standards of the Wisconsin Department of Transportation.

### **...for insurance purposes:**

An employer may provide varying insurance coverage based on age.

### **...for retirement plans:**

An employer may implement the provisions of a bonafide retirement plan so long as it isn't a ploy for age discrimination. However, a plan may not mandate involuntary retirement because of age.

### **What about advertising for employment?**

Wisconsin law prohibits advertisements, employment application forms or other materials which **imply** or **express** a limitation based on a person's age. Therefore, ads calling for “**young or recent college graduates**” or “**youth-oriented**” may be considered unlawful. Application inquiries regarding a person's age are also prohibited, except where the inquiry is to determine if a person is “old enough” for a specific job.

### **Can promotion and training be withheld?**

It is unlawful to deny employees promotions or training opportunities because of their age. For example, it is unfair to deny such opportunities on the assumption that older workers “lack potential” or that training should be earmarked for younger workers who “will be with us longer”.

### **Can older workers be laid-off?**

State and federal laws do not prohibit involuntary layoffs or reductions-in-force affecting older workers. However, employers may not target older workers when deciding who to let go, nor may older employees be transferred to units where they are more likely to be affected by lay-off. Further, lay-off cannot be based upon a person's eligibility for pension benefits.

### **How does the law relate to early retirement?**

Incentives for early retirement might be welcomed by some employees and viewed by others as a message they are no longer wanted. An early retirement offer is generally lawful if it is based on business necessity. However forced early retirement based on a person's age is unlawful.

### **Are waiver and release agreements legal?**

An employee is usually asked to sign a release as part of a termination or acceptance of an early retirement offer. The federal **Older Workers Benefit Protection Act** (part of the ADEA) sets standards which must be met before such a release is considered valid. An individual's signing of a waiver agreement must be done in a “knowing and voluntary” manner, and meet **seven** essential requirements.

It must

1. be written in plain language.
2. make reference to rights or claims arising under the ADEA..
3. not waive rights or claims' arising after the waiver is signed.
4. waive rights or claims only in exchange for money or other benefits in excess of those already entitled to.
5. advise the employee to consult an attorney before signing.
6. give the employee at least 21 days to consider the agreement before signing.
7. permit the employee to revoke the agreement within 7 days after signing.

State law standards are similar.

## What if performance is slipping?

Obviously there can be many reasons for poor performance and age may or may not be a factor. But regardless of age, an employer can expect all workers to perform in a satisfactory manner. An employer is not required to accommodate a person solely because of his or her age.

If poor performance relates to a **disability**, an employer may be required to make a **reasonable accommodation** so that essential job functions can be performed. An accommodation might involve job restructuring, transfer or other strategies, which permit an employee to perform essential job functions.

## What about rejections because a person appears “overqualified” for the job?

An employer’s use of the term “overqualified” may be a sign of age discrimination. It is unlawful for an employer to not hire an experienced older person based merely on the assumption that an older worker might become bored or dissatisfied and leave the job.

## How is the law enforced?

Persons who believe they have been discriminated against because of their age may file a complaint with the Equal Rights Division within **300 days** of the discriminatory action. The Division investigates complaints, helps the parties with settlement and, if necessary, orders relief if discrimination is found after a formal hearing.

## How is age discrimination proven?

The employee or applicant has the burden of proving discrimination and must first meet **four** standards:

- that he or she is 40 or older.
- that he or she was qualified for or was satisfactorily performing the job.
- that some adverse employment action was taken.
- and that, a younger worker, was selected for the position or was treated more favorably.

If these factors are met, the employer then has an opportunity to explain that the action was **not** based on age. Following this explanation, a complainant has an opportunity to show that the explanation is a “pretext” or cover-up for discrimination. The **key question** is whether age was a determining factor in the action taken.

## Resources for older workers

A number of important resources are available to assist employers and older workers. A few key agency resources are:

WISCONSIN CHAPTER OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS (AARP)  
16 N CARROLL SUITE 500  
MADISON WI 53703  
(608) 251-2277  
Provides services for retired AARP members

THE ELDER LAW CENTER OF THE COALITION OF WISCONSIN AGING GROUPS  
2850 DAIRY DR  
STE 100  
MADISON WI 53718  
(608) 224-0660  
Information on aging issues and legal services

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
310 W. WISCONSIN AVENUE, SUITE 800  
MILWAUKEE WI 53203  
(414) 297-1111, (414) 297-1115 (TTY)  
Information about federal employment protections under the ADEA

JOB ACCOMMODATIONS NETWORK (JAN)  
WEST VIRGINIA UNIVERSITY-809 ALLEN HALL  
PO BOX 6123  
MORGANTOWN WV 26506-6123  
(800) 526-7234 (Voice/TTY)  
Asst. Asst.: Making reasonable accommodations

**For information on statewide employment and training opportunities or to recruit workers, contact your nearest Job Center. To locate the Job Center in your area, call 1-888-258-9966.**

This is one of a series of pamphlets highlighting programs of the Wisconsin Department of Workforce Development. It is intended to provide only a general description, not a legal interpretation.

The Equal Rights Division has additional informational material explaining various aspects of the fair employment law.

### **Pamphlet Series**

#1 Fair Hiring & Avoiding Loaded Interview Questions

#2 Harassment In The Workplace

#3 Pregnancy Employment & The Law

#4 Persons with Disabilities on the Job

#5 Fair Employment Law & Complaint Process

#6 Age Discrimination In The Workplace

#7 Settlement

The Department of Workforce Development is an equal opportunity service provider. If you need assistance to access services or need material in an alternate format, please contact us. Deaf, hearing, or speech-impaired callers may reach us in Madison at (608) 264-8752 or in Milwaukee at (414) 227-4081

Web Site: <http://dwd.wisconsin.gov/er/>

**Questions about employment discrimination should be directed to:**

### **EQUAL RIGHTS DIVISION**

PO BOX 8928  
MADISON WI 53708  
Telephone: (608) 266-6860  
TTY: (608) 264-8752

819 N 6th ST ROOM 255  
MILWAUKEE WI 53203  
Telephone: (414) 227-4384  
TTY: (414) 227-4081